UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

2 SISTERS FOOD GROUP, INC. and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167	)	Case Nos. 21-CA-38915 21-CA-38932
2 SISTERS FOOD GROUP, INC. Employer and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167 Petitioner	)	21-RC-21137

RESPONDENT'S REPLY BRIEF TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

This Reply Brief responds to various issues raised by the General Counsel in his Answering Brief to the Respondent's Exceptions to the Administrative Law Judge's ("ALJ") decision.

II. THE GENERAL COUNSEL'S ARGUMENTS THAT THE RECORD DOES NOT SUPPORT MS. REILLY'S REASONABLE BELIEF THAT MS. TRESPALACIOS ENGAGED IN MISCONDUCT ARE FACTUALLY AND LEGALLY WRONG

The General Counsel attempts to shore up the ALJ's erroneous finding that Respondent did not have a reasonable basis to believe that Ms. Trespalacios had engaged in misconduct. However, a fair review of the record evidence will demonstrate that Ms. Reilly had more than a sufficient basis for forming a reasonable, good-faith belief that Ms. Trespalacios had engaged in intimidating conduct warranting her termination.

Ms. Reilly received an oral report from one of the supervisors, Ms. Vega, stating that a lady had been "pushed and abused." ALJD 6:21-22. Naturally, Ms. Reilly asked the supervisor to take statements from "***any*** of the witnesses that was around the area." Tr. 345:12-13 (emphasis added). Ms. Reilly ultimately received four written statements: (1) the supervisor, Ms. Vega, (2) the Lead of Ms. Flores, Ms. Avila, (3) Ms. Flores, and (4) Ms. Vicente.

- Ms. Avila's statement says, "Yolanda Flores coming from the lunch room and told me that a lady from poultry had told her a bad word and had ***pushed her***..." ALJD 6:45-46 (emphasis added).

- Ms. Vega's statement says, "...Xonia Trespalacios ***pushed her*** [Flores] and told her that when the Union comes in, she will be ***fired with a kick up her __s***...Yolanda tells me she feels really uncomfortable with the things Xonia Trespalacios told her." ALJD 7:3-6 (emphasis added).

- Ms. Flores statement says, "...[S]he [Trespalacios] told me that ***she was going to kick my ass out*** and throw me away and ***she pushed me***. And I am very upset for what she told me..." ALJD 6:25-29 (emphasis added).

- Ms Vicente statement says, " Xonia approached Yolanda touching her on the shoulder. And Yolanda told her, 'Are you angry because I don't support your Union?'..." ALJD 6:39-40.

After reading the statements, Ms. Reilly reviewed video footage of the incident which confirms the pushing and shoving described in the statements. Tr. 442:3-9. The General Counsel asserts the video does not show a "violent assault". But, whether the video shows a "violent assault" or pushing and bumping, it cannot be denied that the video clearly demonstrates Ms. Trespalacios pushing Ms. Flores at least five times, with sufficient force to move her body to one side. Resp. Ex. 1. It also shows Ms. Trespalacios waiving her finger aggressively in Ms. Flores' face. In the video, Ms. Trespalacios walks away, then walks back and bumps her folded arms against Ms. Flores' body.

The General Counsel argues the ALJ properly concluded the video footage alone is insufficient for Respondent to conclude that Ms. Trespalacios assaulted Ms. Flores. The General Counsel and the ALJ are wrong in two important respects. First, the video shows Ms. Trespalacios pushing and bumping Ms. Flores and a reasonable viewer can plainly see this was not a friendly touching. Indeed, Ms. Vicente, a friend of Ms. Trespalacios, admitted that upon seeing the video, she was surprised it showed Ms. Trespalacios pushing Ms. Flores "so, strongly" and "aggressively," to the point that Ms. Flores' body moved like she had been pushed. Tr. 103:13-104:6. Further, Ms. Vicente admitted the video showed Ms. Trespalacios making aggressive hand gestures to Ms. Flores. Tr. 103:15-18. Ms. Reilly was just as justified as Ms. Vicente in concluding, based on the video, that Ms. Trespalacios "strongly" and "aggressively" pushed Ms. Flores and made aggressive hand gestures in her face.

Second, Ms. Reilly did not rely on the video alone. She had reviewed the statements of witnesses that informed her that Ms. Flores had been pushed and verbally threatened by

Ms. Trespalacios. The video confirmed what had been previously reported to her with regard to the physical assault. After reviewing the video, Ms. Reilly concluded, "There was nothing I needed to know any more than what I could see." Tr. 367:12-23.

Notwithstanding the above, the ALJ still faults Ms. Reilly for failing to conduct an adequate investigation. In a misguided attempt to support the ALJ's erroneous conclusion, the General Counsel again argues that the ALJ's correctly found "disciplinary haste," which supports a finding of animus. We demonstrated that finding was wrong in our Exceptions and need not re-argue the point here. But in his Answering Brief, the General Counsel now improperly argues that the day and one half delay in terminating Ms. Trespalacios, and the fact that Respondent did not suspend her pending the investigation, demonstrates that it did not consider the assault to be serious. First, this argument should be disregarded as it does not respond to an argument made by Respondent in its Exceptions.[1] Second, the fact that Ms. Reilly did not perceive Ms. Trespalacios to be a continuing threat to Ms. Flores, requiring her immediate suspension, does not take away from Ms. Reilly's reasonable belief that

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[1] The General Counsel improperly raises a new issue in its Answering Brief that was not raised by Respondent in Respondent's Exceptions and thus, should be disregarded. The Board Rules and Regulations section 102.46(d)(2) states, "The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof." *See also G & S Transp.*, 286 NLRB 762, 762 n. 3 (1987) ("The Respondent raised a credibility issue in its brief in response to the General Counsel's exceptions. The General Counsel moved to strike the section of the Employer's brief raising the credibility issue as that section does not address any issue raised by the General Counsel in her exceptions and therefore is not a proper subject to cross-exceptions. We agree with the General Counsel and grant her motion to strike the Respondent's cross-exceptions. See Sec. 102.46(d)(2)...").

Ms. Trespalacios had engaged in intimidating conduct,[2] and that the conduct warranted her termination.[3]

The General Counsel re-argues that Respondent's failure to follow its own disciplinary policy of interviewing all witnesses supports the ALJ's finding of animus. However, Ms. Reilly asked the supervisor to take statements from "***any*** of the witnesses that was around the area." Tr.345:12-13 (emphasis added). The supervisor translated statements written in Spanish to English for Ms. Reilly's benefit and Ms. Reilly reviewed all statements that were given to her. Tr. 351:10-11; 359:7-15. The record does not reflect why the supervisor did not obtain a statement from Ms. Castillo. Importantly, there is nothing to suggest that Ms. Reilly did or said anything to the supervisor indicating that she should not interview another witness. In fact, the record demonstrates that at the time Ms. Reilly reviewed the video footage and the statements that had been given to her, Ms. Reilly did not know the identity of the other person at the table

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[2] The General Counsel points to the fact that Jesus Guzman had also engaged in threatening conduct, but was sent home immediately, unlike Ms. Trespalacios, indicating that Ms. Reilly did not perceive Ms. Trespalacios' conduct to be threatening. But the General Counsel's argument does not withstand scrutiny. Ms. Reilly did not have anything to do with the suspension or termination of Mr. Guzman. That situation was handled by H.R. representative, Angie Sandoval, who was on leave at the time of the Trespalacios incident and was not available to Ms. Reilly for advice. Further, Mr. Guzman's assault was more aggravated and required the intervention of a security guard indicating that the situation was not over and that immediate suspension was warranted. That Ms. Reilly did not see the need to suspend Ms. Trespalacios pending completion of her investigation does not show condonation of the conduct nor a tacit admission that Ms. Trespalacios' conduct was not serious. Indeed, had Ms. Reilly suspended Ms. Trespalacios, the General Counsel would have no doubt second guessed her for taking that action as he does now for failing to suspend her.

[3] It is important to note that neither the General Counsel nor the Charging Party have argued that even if Ms. Reilly reasonably believed that Ms. Trespalacios assaulted Ms. Flores as described and made the threat to have Ms. Flores fired when the Union came in, that such conduct does not warrant termination. Nor did the ALJ make such a finding. Rather, they all argue that Ms. Trespalacios' actions were minimal and friendly, notwithstanding the testimony of Ms. Flores (which was not discredited), the statements of witnesses, and the video tape, all of which impeach Ms. Trespalacios' version of the event. In this regard, it should be noted that the General Counsel never argues that Ms. Trespalacios' version of the event is true. The General Counsel only sets forth what Ms. Trespalacios says. The obvious reason is that the General Counsel knows that Ms. Trespalacios is either lying or wrong, but in any event the General Counsel does not vouch for her story.

during the incident. Tr. 408:13-18.[4] Moreover, the General Counsel fails to meaningfully distinguish the cases cited by Respondent holding that not interviewing every single witness is not a *per se* indication of union animus. *See e.g., Sara Lee,* 348 NLRB 1133 (2006) (holding by Judge Parke that "interviewing the subject employee is not a requirement for an adequate investigation"); *Bonanza Aluminum Corp.,* 300 NLRB 584, 590 (1990) (noting that fact that employer did not interview all possible witnesses does not raise inference of unlawful conduct); *Detroit Newspaper Agency,* 342 NLRB 223, 302 (2004) (stating that as video tape of incident was available to Respondent, it was unnecessary to interview all witnesses and failure to do so does not establish that investigation was insufficient).

The General Counsel again re-argues that Ms. Reilly's rejection of Ms. Vicente's "contradictory" statement supports the ALJ's finding of animus. Even assuming *arguendo* the facts as asserted by the General Counsel, that Ms. Vicente's statement was in fact "contradictory," Ms. Reilly was certainly entitled to weigh this so-called "contradictory" statement against the statements of three others which indicated Ms. Trespalacios had clearly pushed Ms. Flores. Ms. Reilly was also entitled to rely upon what she observed on the video and to reject the statement of Ms. Vicente to the extent that it was an incomplete or an unreliable description of the incident. *Merillat Indus., Inc.,* 307 NLRB 1301, 1303 (1992) ("Respondent is required to establish its *Wright Line* defense only by a preponderance of the evidence. The Respondent's defense does not fail simply because not all of the evidence supports, or even because some of the evidence tends to negate it").

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[4] It is also important to note that in the termination of Jesus Guzman who was also fired for pushing a fellow employee (Ryan Maher), Respondent did not interview all witnesses to the incident. The email "incident report" by Mr. Maher identifies Veronica Vega as a witness to the incident. Resp. Ex. 4. But Ms Vega was not interviewed and did not provide a statement. Tr. 315:12-21. Thus, no inference of discriminatory motive can be drawn from the failure to obtain a statement from Ms. Castillo.

General Counsel repeats his argument that Respondent's failure to follow its written policy by not giving Ms. Trespalacios an opportunity to explain her actions supports the ALJ's finding of animus. But, as we argued in our Exceptions, even if Ms. Reilly had asked Ms. Trespalacios to describe the incident, Ms. Reilly would have been entitled to reject her version as being inconsistent with what she saw on the CD with her own eyes and what she had read in the statements submitted by other employees. *See Eldorado, PCC Specialty Prods., Inc.*, Case 34-CA-7674, 1997 WL 33316084 (Dec. 31, 1997) (noting by ALJ on Respondent's failure to obtain employee's version of incident, "One can assume that [the subject employee] would have denied making the threat and that [the witness] would have answered in the same manner he did at the hearing"); *Cent. Freightlines, Inc.*, 2002 NLRB Lexis 146, at*20-*21 (Apr. 2002) (holding by ALJ "that it was not incongruent for respondent to discharge [employee] without first confronting him with his actions or subjecting him to progressive discipline" as it had a reliable report of the employee's misconduct which was corroborated by a video tape). Ms. Reilly's decision not to interview Ms. Trespalacios in view of the reliable reports that she had read, which were confirmed by what she was able to observe on the video, reflects sound judgment and is entirely consistent with a good-faith belief that Ms. Trespalacios had engaged in misconduct, warranting termination.

In additional, both the ALJ and General Counsel fail to acknowledge that Respondent's disciplinary policy allows for exactly what Ms. Reilly did with respect to the Trespalacios assault. The policy states, "<u>for example</u>, a supervisor, in evaluating disciplinary options for an offense that would typically receive a written warning, might determine that the circumstances surrounding the offense were such that suspension or <u>immediate termination was warranted</u>. This policy would not limit the supervisor's discretion to impose the more severe penalty." GC

Exh. 14 (emphasis added). The policy also states, "While supervisors will generally follow the progressive steps listed below … they may also take other factors into consideration, and as: … the seriousness of the offenses … other mitigating or aggravating circumstances." GC Exh. 14.

Moreover, both Ms. Reilly and Angie Sandoval testified without contradiction that the policies were guidelines and not rigidly applied. The extent of the investigation was dependant on the circumstances and, indeed, in some circumstances there may be no investigation at all. Tr. 334:22-25; 335:6-11; 415:4-14.

III. THE ALJ IMPROPERLY CONCLUDED THAT MS. REILLY'S SPEECH EVIDENCED UNION ANIMUS AND INTERFERED WITH A FAIR ELECTION

The General Counsel only cites to one case to rebut Respondent's position that Ms. Reilly's post-termination speech was protected by Section 8(c). The General Counsel quotes the *Mammoth Coal Co.* case for the proposition that "***antiunion statements***, even if not themselves alleged to be violations of the Act, are nevertheless evidence of antiunion animus or motivation." (emphasis added). The problem with the General Counsel's argument is that Ms. Reilly's speech did not contain anti-union statements.

Ms. Reilly showed a video clip of what occurred at the plant and spoke about not tolerating the mistreatment of co-workers who disagree on the union question. Ms. Reilly stated,

> "I want you to know that you're all free to have your own opinions about the union or anything else without worrying that someone else is going to abuse you because you disagree with them… You have my word that 2 Sisters will protect your right to decide how you want to vote without being intimidated or threatened… I think you'll agree with me that this type of behavior cannot be allowed here. It doesn't matter who does it…" GC Exh. 4.

Because the video clip and the speech did not contain a threat of reprisal or force or promise of benefit, it is protected under Section 8(c) of the Act and cannot be used as evidence

of an unfair labor practice.[5] *See NLRB v. Gissel Packing Co.*, 395 US 375, 618 (1969); *Shop-Rite Dev. Co., Inc.*, 215 NLRB 777, 778 (1974) (finding that employer's statements "are within the purview of Section 8(c) of the Act and therefore do not constitute objectionable conduct warranting setting aside the election"). The General Counsel failed to point to language in the speech that constitutes a threat of reprisal or force or a promise of benefit. Telling employees that an employee had been terminated for abusing a co-worker and cautioning that intimidating

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[5] Even if *arguendo* Respondent took advantage of Ms. Trespalacios' conduct to convey its view to employees that unions cause discord between employees which impedes employees from working together peacefully, such an expression of opinion is fully protected by Section 8(c) of the Act. *See NLRB v. Gissel Packing Co.*, 395 U.S. 375, 618 (1969) ("[A]n employer is free to communicate... his general views about unionization... so long as the communications do not contain a 'threat of reprisal, or force or promise of benefit'").

behavior will not be tolerated protects employee free choice and the election process. It cannot be reasonably interpreted as coercive conduct that interfered with the election.[6]

Moreover, General Counsel's emphasis on the fact that Ms. Trespalacios "was terminated 4 days before the election" as a basis to set aside the election is particularly unconvincing. Ms. Trespalacios was the one who had pushed Ms. Flores "five times" with "hard" pushes, close to the election and threatened to have her fired when the Union came in. Tr. 238:20-24. Respondent did not control the timing of the incident. It acted on the incident in an appropriate manner when it occurred. It would be improper for the Board to rely on the timing of Ms. Trespalacios' termination to find a violation of the Act where the timing was dictated by the actions of Ms. Trespalacios, not Respondent.

IV. CONCLUSION

For the reasons set forth above and in Respondent's Exceptions, the Board must reverse the decision of the Administrative Law Judge.

DATED: September 13, 2010

Respectfully submitted,

By: _____

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[6] The General Counsel argues that because Ms. Reilly mentioned in her speech that Respondent had to terminate another employee for threats against another employee who did not support the union evidences animus because Ms. Reilly did not actually know about any such termination. The General Counsel bases this argument on an incomplete portion of Ms. Reilly's testimony wherein Ms. Reilly stated that she did not know a significant amount about the termination of this employee. However, when Ms. Reilly was asked whether there were prior assaults involving the election, Ms. Reilly plainly stated, "I know about it." Tr. 432:19. The General Counsel's argument is without foundation.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2010, I caused copies of the **RESPONDENT'S REPLY BRIEF TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** to be served on the following parties by transmitting a true and correct copy via E-mail the document(s) listed above on this date before 5:00 p.m. PDT to the person(s) at the email address(es) set forth below.

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